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IN THE
Supreme Court of the United States

TRUTH, ET AL.,

Petitioners,

v.

KENT SCHOOL DISTRICT, ET AL.,

Respondents.

On Petition for Writ of Certiorari
to the United States Court of Appeals
for the Ninth Circuit

BRIEF *AMICI CURIAE* OF CHRISTIAN LEGAL SOCIETY, CAMPUS CRUSADE FOR CHRIST, AND INTERVARSITY CHRISTIAN FELLOWSHIP/USA IN SUPPORT OF PETITIONERS

GREGORY S. BAYLOR
COUNSEL OF RECORD
KIMBERLEE WOOD COLBY
M. CASEY MATTOX
CENTER FOR LAW &
RELIGIOUS FREEDOM
CHRISTIAN LEGAL SOCIETY
8001 Braddock Road
Suite 300
Springfield, VA 22151
(703) 642-1070 ext. 3502
Counsel for Amici Curiae

TABLE OF CONTENTS

TABLE OF AUTHORITIES iii

INTEREST OF *AMICI CURIAE* 1

SUMMARY OF ARGUMENT 3

ARGUMENT 3

I. THE NINTH CIRCUIT HAS EXTENDED *TRUTH v. KENT SCHOOL DISTRICT* TO UNIVERSITIES, THE QUINTESSENTIAL "MARKETPLACE OF IDEAS." 3

A. Registered Student Groups at Hastings 4

B. Christian Legal Society 5

C. Court Proceedings 7

II. THE COURT SHOULD GRANT THE PETITIONS IN BOTH THIS CASE AND IN *CHRISTIAN LEGAL SOCIETY v. NEWTON*, FILED MAY 5, 2009. 9

III. PUBLIC UNIVERSITY OFFICIALS' DENIAL OF RECOGNITION TO RELIGIOUS STUDENT GROUPS BECAUSE THEY REQUIRE THEIR LEADERS AND VOTING MEMBERS TO SHARE THEIR RELIGIOUS VIEWPOINTS IS A RECURRING AND PERVASIVE NATIONWIDE PROBLEM.....13

CONCLUSION.....22

TABLE OF AUTHORITIES

Cases:

Alpha Iota Omega Christian Fraternity v. Moeser, No. 04-765, 2005 WL 1720903 (M.D.N.C. Mar. 2, 2005) 19

Alpha Iota Omega Christian Fraternity v. Moeser, 2006 WL 1286186 (M.D.N.C. May 4, 2006) 20

Beta Upsilon Chi v. Adams, No. 06-104 (M.D. Ga. 2006) 20

Beta Upsilon Chi, Upsilon Chapter at the Univ. of Fla. v. Machen, 559 F. Supp. 2d 1274 (N.D. Fla. 2008), *appeal docketed*, No. 08-13332 (11th Cir. Jul. 30, 2008) 19

Bd. of Regents of the Univ. of Wis. Sys. v. Southworth, 529 U.S. 217 (2000) 4

Boy Scouts of America v. Dale, 530 U.S. 640 (2000) 10

Christian Legal Soc'y Chapter at Ariz. State Univ. v. Crow, No. 04-2572 (D. Ariz. Nov. 17, 2004) 17

Christian Legal Soc'y v. Eck, No. 07-154 (D. Mont. Nov. 14, 2008) 16

Christian Legal Soc'y Chapter of Washburn Univ. Sch. of Law v. Farley, No. 04-4120 (D. Kan. Sept. 16, 2004) 15

Christian Legal Soc'y Chapter of the Ohio State Univ. v. Holbrook, No. 04-197 (S.D. Ohio 2004) 17

Christian Legal Soc'y Chapter of the Univ. of Toledo v. Johnson, No. 05-7126 (N.D. Ohio Jun. 16, 2005) 16

Christian Legal Soc'y v. Kane, 2006 WL 997217 (N.D. Cal. 2006), *aff'd*, 2009 WL 693391 (9th Cir. 2009), *petition for cert. filed sub nom. Christian Legal Soc'y v. Newton* (U.S. May 5, 2009) ..... *passim*

Christian Legal Society v. Walker, 453 F.3d 853 (7th Cir. 2006) ..... *passim*

DiscipleMakers v. Spanier, No. 04-2229 (M.D. Pa. 2005) 21

Every Nation Campus Ministries at San Diego State Univ. v. Achtenberg, 597 F. Supp. 2d 1075 (S.D. Cal. 2009), *docketed on appeal sub nom. Alpha Delta Chi-Delta Chapter v. Reed*, No. 09-55299 (9th Cir. Feb. 27, 2009) 18

Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston, 515 U.S. 557 (1995) 10

Maranatha Christian Fellowship v. Regents of the Bd. of the Univ. of Minn. Sys., No. 03-5618 (D. Minn. Oct. 24, 2003) 15

Rosenberger v. Rector of the Univ. of Virginia,

515 U.S. 819 (1995).....4

Truth v. Kent Sch. Dist., 499 F.3d 999 (9th Cir. 2007), *withdrawn*, 524 F.3d 957 (9th Cir. 2008), *amended by* 542 F.3d 634 (9th Cir. 2008), *reh'g denied*, 551 F.3d 850 (9th Cir. 2008), *petition for cert. filed*, 77 U.S.L.W. 3531 (U.S. Mar. 10, 2009) (No. 08-1130).....*passim*

Univ. of Wis.-Madison Roman Catholic Found. v. Walsh, No. 06-649, 2007 WL 1056772 (W.D. Wis. Apr. 4, 2007). 19

Widmar v. Vincent, 454 U.S. 263 (1981) 4

Constitution, Statutes & Rules:

U.S. Const. amend. I.....*passim*

Equal Access Act, 20 U.S.C. §§ 4071-4074.....11

Sup. Ct. R. 35.3 4

Other Sources:

Stephen M. Bainbridge, *Student Religious Organizations and University Policies Against Discrimination on the Basis of Sexual Orientation: Implications of the Religious Freedom Restoration Act*, 21 J.C. & U.L. 369 (1994).....16, 17

Burton Bollag, *Choosing Their Flock*, Chronicle of Higher Education, Jan. 28, 2005.....14

Press Release, Foundation for Individual Rights in Education, Victory for Religious Freedom at Louisiana State University (Mar. 17, 2005), *available at* http://www.thefire.org/index.php/article/5436.html (last visited Apr. 30, 2009) 20

Ga. Op. Att'y Gen. 97-32 (1997).....21

Joan W. Howarth, *Teaching Freedom: Exclusionary Rights of Student Groups,* 42 U.C. Davis L. Rev. 889 (2009) 13

Note, *Leaving Religious Students Speechless: Public University Antidiscrimination Policies and Religious Student Organizations,* 118 Harv. L. Rev. 2882 (2005).....14

Patricia A. MacLean, *Law School Need Not Support Religious Club that Discriminates,* National Law Journal, Mar. 23, 2009.....14

Ohio Union, Student Organization Registration Guidelines, *available at* http://*ohiounion*.osu.edu/studentorgs/orgs_manage.asp#newreq (last visited Apr. 9, 2009).....17

Michael S. Paulsen, *A Funny Thing Happened on the Way to the Limited Public Forum: Unconstitutional Conditions on "Equal Access" for Religious Speakers and Groups,* 29 U.C. Davis L. Rev. 653 (1996).....15

Jeff Polesovsky, *GLBT Group Files Formal Complaint Against CLS*, The Lantern, Nov. 18, 2003 17

Adam *Sullivan, UI Christian Legal Society's Funding Under Fire*, Daily Iowan, Mar. 3, 2009 18

Student Unions & Activities, *Registration and Classification of Student Groups, in Student Unions & Activities Policy Handbook, available at* http://www.sao.umn .edu/groups/handbook/classification.php (last modified Apr. 15, 2008) 15

U.S. Census Bureau, Census 2000 Summary File 3 (SF 3) - Sample Data, QT-P19. School Enrollment: 2000 13

Ryan C. Visser, Note, *Collision Course?:* Christian Legal Society v. Kane *Could Create a Split over the Right of Religious Student Groups to Associate in the Face of Law School Antidiscrimination Policies*, 30 Hamline L. Rev. 449 (2007) 14

INTEREST OF *AMICI CURIAE*[*]

Christian Legal Society ("CLS") is a nonprofit, interdenominational association of Christian attorneys, law students, judges, and law professors with chapters in nearly every state and at numerous accredited law schools. As set forth in the brief, numerous public law schools have denied (or threatened to deny) CLS student chapters access to meeting space, funding, and other benefits because they draw their leaders and voting members from among those who share their core religious viewpoints. Through its Center for Law & Religious Freedom, CLS frequently advocates for the religious freedom of its law student chapters and other student religious groups.

Campus Crusade for Christ ("CCC") has student chapters meeting at 731 universities and colleges across the country, including student chapters at 417 public universities and colleges. CCC also operates Student Venture, a ministry geared towards high school students. The purpose of CCC is to fulfill the Great Commission, Jesus' command to His disciples to "go and make disciples of all nations, baptizing them in the name of the Father and of the Son and of the Holy Spirit, and teaching them to obey

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[*] Counsel of record were notified on March 26, 2009, of the *amici*'s intent to file this brief. The parties consented to the filing of this brief, and copies of the consent letters are on file with the Clerk of the Court. Counsel for a party did not author this brief in whole or in part. No person or entity, other than the *amici curiae*, its members, or its counsel made a monetary contribution to the preparation and submission of this brief.

everything I have commanded you." Matthew 28:19-20.

Specifically, the goal of its student chapters is to reach every student at their campuses every year with the Gospel. Its leaders are to be effective witnesses of the Gospel to other students. At numerous public universities, CCC student groups have been threatened with denial of equal access to meeting space, funding, and other benefits because they set religious criteria for their leadership.

InterVarsity Christian Fellowship/USA ("IVCF") has as its purpose to establish and advance at colleges and universities witnessing communities of students and faculty who follow Jesus as Savior and Lord: growing in love for God, God's Word, God's people of every ethnicity and culture and God's purposes in the world. IVCF carries out its ministry through student chapters. Officers of those chapters are required to subscribe to the purpose and doctrinal basis of IVCF and must subscribe to certain basic biblical truths of Christianity. Currently, IVCF has approximately 855 chapters on 556 campuses in the United States, including chapters at 299 public universities and colleges. Many IVCF student chapters at public universities have been threatened with denial of equal access to meeting space because they set religious criteria for their leadership.

SUMMARY OF ARGUMENT

The *amici* agree with the Petitioners that the Ninth Circuit erred in interpreting and applying the Equal Access Act;[1] that the Ninth Circuit erred in interpreting and applying the Constitution; and that this Court ought to grant the petition for a writ of certiorari.

The *amici* write separately to inform the Court that the Ninth Circuit has already extended *Truth v. Kent School District* to the higher education context; to urge the Court to grant the petitions for writ of certiorari both in this case and in *Christian Legal Society v. Newton*; and to describe the magnitude of the problem illustrated by the *Truth* and *Newton* cases.

ARGUMENT

I. THE NINTH CIRCUIT HAS EXTENDED *TRUTH v. KENT SCHOOL DISTRICT* TO UNIVERSITIES, THE QUINTESSENTIAL "MARKETPLACE OF IDEAS."

The *amici* urge this Court to review and reverse *Truth v. Kent School District* because the Ninth Circuit quickly and inexplicably extended that decision to colleges and universities. In *Christian Legal Society v. Kane*, 2009 WL 693391 (9th Cir. 2009), *petition for cert. filed sub nom. Christian*

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[1] *Amicus* CCC has a particular interest in this Court's resolution of Truth's Equal Access Act claim, for it operates Student Venture, a ministry geared towards high school students.

Legal Soc'y v. Newton (May 5, 2009),[2] the Ninth Circuit explicitly relied upon *Truth* to reject the constitutional claims of a religious student group, the Christian Legal Society chapter at Hastings College of the Law, that had been denied recognition under the public law school's nondiscrimination rule.

A. Registered Student Groups at Hastings

Like most institutions of higher learning, Hastings encourages the formation and vibrant operation of student groups in order to promote "the expression of a variety of viewpoints." As this Court has recognized, the "avowed purpose" for recognizing student groups is "to provide a forum in which students can exchange ideas." *Widmar v. Vincent*, 454 U.S. 263, 272 n.10 (1981). *See Bd. of Regents of the Univ. of Wis. Sys. v. Southworth*, 529 U.S. 217, 229 (2000) (university's forum for student groups "facilitate[es] the free and open exchange of ideas by, and among, its students"); *Rosenberger v. Rector of the Univ. of Virginia*, 515 U.S. 819, 834 (1995) (university's forum for student groups "encourage[s] a diversity of views from private speakers").

Recognition confers various benefits upon "Registered Student Organizations" (RSOs), including access to reserved meeting space, various

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[2] The district court and Ninth Circuit opinions are styled *Christian Legal Society v. Kane*, reflecting the name of the former dean of the Hastings College of the Law. Given that Nell Jessup Newton is now the dean, the petition for writ of certiorari is styled *Christian Legal Society v. Newton*. *See* Sup. Ct. R. 35.3. For the sake of convenience and clarity, this brief will generally refer to the district court and Ninth Circuit decisions as *Christian Legal Society v. Newton*.

mechanisms for communicating with the law school community, and funding.

Hastings has recognized groups formed to express viewpoints on topics such as politics, religion, culture, and human sexuality. Recognized groups include Outlaw (a group advocating for the interests of homosexual and bisexual students), the Black Law Students Association, the Clara Foltz Feminist Society, Silenced Right: National Alliance Pro-Life Group, Law Students for Choice, Hastings Republicans, Hastings Democratic Caucus, and the Vietnamese American Law Society.

Hastings requires groups seeking recognition to include its Nondiscrimination Policy in their constitutions. The policy declares that Hastings will not discriminate on the basis of religion and sexual orientation, among other things. Although the Nondiscrimination Policy enumerates nine protected categories, Hastings asserts that it requires RSOs to "allow any student to participate, become a member, or seek leadership positions in the organization, regardless of their status or beliefs." Hastings has recognized many groups whose constitutions provide that their officers and voting members should agree with their organizations' missions and viewpoints.

B. Christian Legal Society

Founded in 1961, Christian Legal Society is a nationwide association of lawyers, law students, law professors, and judges who profess faith in Jesus Christ. Its purposes include providing a means of society, fellowship, and nurture among Christian

lawyers; encouraging, discipling, and aiding Christian law students; promoting justice, religious liberty, and biblical conflict resolution; and encouraging lawyers to furnish legal services to the poor. In furtherance of its purposes, the national Christian Legal Society maintains attorney and law student chapters across the country, including one at Hastings.

CLS welcomes all Hastings students to attend and participate in its meetings and other activities. CLS wants persons who are not CLS members to come, listen, and participate in hopes they will be persuaded to agree with CLS's religious viewpoints. CLS, however, does not allow nonmembers to vote on chapter decisions or lead the group. CLS has only one category of membership: voting members, who are eligible to choose the group's officers, stand for election to officer positions, amend the group's constitution, vote on chapter business, and teach weekly Bible studies. A student who wishes to become a voting member of CLS must affirm a commitment to the group's foundational principles by signing the national CLS Statement of Faith, which articulates beliefs commonly regarded as orthodox in the Protestant evangelical and Catholic traditions. An individual raised in a faith other than Christianity is eligible for voting membership if he or she affirms the Statement's orthodox Christian tenets. Conversely, a person raised as a Christian is not eligible if he or she no longer can affirm the Statement of Faith.

In light of contemporary controversies regarding human sexuality within various religious

denominations, national Christian Legal Society reaffirmed in March 2004 its understanding of biblical principles of sexual morality and explained how that understanding derives from its Statement of Faith. It stated, "In view of the clear dictates of Scripture, unrepentant participation in or advocacy of a sexually immoral lifestyle is inconsistent with an affirmation of the Statement of Faith, and consequently may be regarded by CLS as disqualifying such an individual from CLS membership."

A person who advocates or unrepentantly engages in sexual conduct outside of marriage between a man and a woman is not considered to be living consistently with the Statement of Faith and, therefore, is not eligible for leadership or voting membership. A person's mere experience of same-sex or opposite-sex sexual attraction does not determine his or her eligibility for leadership or voting membership. CLS individually addresses each situation that arises in a sensitive Biblical fashion.

Hastings concluded that CLS violated its Nondiscrimination Policy on the basis of religion and sexual orientation and thus denied CLS recognition. The chapter commenced civil rights litigation in federal court, claiming that Hastings violated its constitutional rights.

C. Court Proceedings

The district court ruled against CLS at the summary judgment stage. *Christian Legal Society v.*

Newton, 2006 WL 997217 (N.D. Cal. 2006). CLS appealed to the Ninth Circuit. In its briefing, CLS relied heavily upon the Seventh Circuit's decision in *Christian Legal Society v. Walker*, 453 F.3d 853 (7th Cir. 2006), a case involving a different chapter of *the very same national organization* denied recognition based on a public law school's nondiscrimination policy.

After briefing, the Ninth Circuit postponed oral argument pending its resolution of *Truth*. As set forth in Truth's petition in the instant case, the Ninth Circuit eventually concluded that it should *not* analyze whether Kent School District's application of its nondiscrimination policy impaired Truth's ability to control the content of its message and, if so, whether such an impairment was the least restrictive means of advancing a compelling governmental interest. *Truth*, 542 F.3d at 651, 652 (Fisher & Wardlaw, JJ., concurring). Instead, it simply analyzed whether the exclusion was viewpoint neutral and reasonable in light of the purposes served by the forum.

Having disposed of *Truth*, the Ninth Circuit scheduled oral argument in *Newton*. One week after oral argument, the court issued a two sentence opinion citing *Truth*, 542 F.3d 634, and affirming the decision of the district court. Applying "the lesser standard of scrutiny" utilized in *Truth*, the Ninth Circuit held that Hastings' denial of recognition of CLS was "viewpoint neutral and reasonable" and thus constitutionally permissible. Without discussion, the Ninth Circuit extended *Truth* from the high school to the higher education context.

Given that the *amici* operate primarily on the campuses of higher educational institutions, the Ninth Circuit's decisions in *Truth* and *Newton* undermine their constitutional rights and thus their ability to express their religious messages. Accordingly, the *amici* urge this Court to grant the petition.

II. THE COURT SHOULD GRANT THE PETITIONS IN BOTH THIS CASE AND IN *CHRISTIAN LEGAL SOCIETY v. NEWTON*, FILED MAY 5, 2009.

The Christian Legal Society chapter at Hastings filed a petition for a writ of certiorari in this Court on May 5, 2009. The *amici* urge the Court to grant the petitions in that case ("*Newton*") and in the instant case ("*Truth*").

As Truth argues in its petition, the Ninth Circuit's ruling in *Truth* created a conflict with *Christian Legal Society v. Walker*, 453 F.3d 853 (7th Cir. 2006). The Ninth Circuit's ruling in *Newton* creates an even clearer conflict because both cases involve chapters of the same national organization, identical material facts, and the same legal claims, but reach diametrically opposite results.

In *Walker*, the dean of Southern Illinois University School of Law derecognized the Christian Legal Society chapter because he believed its requirement that officers and voting members share its religious viewpoints violated the school's antidiscrimination policy. *Walker*, 453 F.3d at 857-

58. The chapter sued, raising expressive association and free speech claims. The Seventh Circuit properly applied this Court's precedents to the expressive association claim before separately applying forum analysis to the free speech claim. *Id.* at 861-67.

With regard to CLS's expressive association claim, the Seventh Circuit correctly applied *Boy Scouts of America v. Dale*, 530 U.S. 640 (2000), and *Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston*, 515 U.S. 557 (1995), to determine whether the law school's application of its antidiscrimination policy to the chapter "affect[ed] in a significant way the group's ability to advocate its viewpoint." *Walker*, 453 F.3d at 861-63 (internal citations and quotations omitted). "To ask this question," according to the court, "[wa]s very nearly to answer it." *Id.* at 862. The court concluded, "[i]t would be difficult for CLS to sincerely and effectively convey a message of disapproval of certain types of conduct if, at the same time, it must accept members who engage in that conduct." *Id.* at 863. Indeed, "[t]he only apparent point of applying the policy to an organization like CLS is to induce CLS to modify the content of its expression or suffer the penalty of derecognition." *Id.*

Following *Dale*, the Seventh Circuit then correctly applied strict scrutiny. *Id.* "In order to justify interfering with CLS's freedom of expressive association, [the law school]'s policy must serve a compelling state interest that is not related to the suppression of ideas and that cannot be achieved through a less restrictive means." *Id.* The court

held that the school had identified no interest in applying its policy to the chapter. *Id.*

As discussed above, the district court and the Ninth Circuit in *Newton* declined to follow the Seventh Circuit's *Walker* decision. Diverging from this Court's expressive association jurisprudence, the Ninth Circuit failed to consider whether Hastings' application of its Nondiscrimination Policy to CLS "affect[ed] in a significant way the group's ability to advocate public or private viewpoints." *Dale*, 530 U.S. at 648. Nor did the Ninth Circuit apply the requisite level of scrutiny—strict scrutiny. Instead, following the erroneous approach of *Truth v. Kent*, the court refused separately to consider *all* of CLS's claims—expressive association, free speech, free exercise of religion, and equal protection—and asked only whether Hastings' application of its policy to CLS was "viewpoint neutral and reasonable."

The complementary facts in *Christian Legal Society v. Newton* and this case militate in favor of granting both petitions so that this Court can fully resolve the problem and provide guidance to the lower federal courts.

The *Truth* case, of course, involves a high school, rather than a university. Therefore, the Equal Access Act applies, whereas the Act is inapplicable to universities and graduate schools. Equal Access Act, 20 U.S.C. §§ 4071-4074. This Court may well decide *Truth* solely on *federal statutory* grounds applicable only to *secondary* schools, leaving unresolved the circuit conflict over *First Amendment* protection at

the *university* level of a religious group's right to draw its officers and voting members from among those who share its core religious commitments. It would be an odd result if religious associations were protected under the Equal Access Act in secondary schools, but their First Amendment protection at the college level was left uncertain.

Furthermore, *Newton* directly raises an issue that *Truth* expressly left open: whether requiring a religious student group to accept *officers and voting members* who disagree with the group's core religious commitments violates the First and Fourteenth Amendments. The *Truth* decision is explicitly limited to the club's "general membership restrictions." *Truth,* 542 F.3d at 644, 647. To be sure, the Ninth Circuit erred in *Truth* by diminishing the associational import of Truth's "general members"; it most certainly erred in *Newton*, where CLS had elevated associational interests in its voting members and leaders, who elect officers, stand for election, amend the group's constitution, lead Bible studies, vote on chapter business, organize group activities, and invite guest speakers for weekly meetings and campus-wide events. Without explanation, the Ninth Circuit in this case extended its *Truth* decision to CLS's selection of voting membership and leadership.

By granting both petitions, the Court would have before it the full breadth of the issues upon which the circuit courts have split and which continue to vex school administrators and lower courts. The Court could provide meaningful guidance to lower

courts, as well as national student organizations and education officials carefully watching this issue.

III. PUBLIC UNIVERSITY OFFICIALS' DENIAL OF RECOGNITION TO RELIGIOUS STUDENT GROUPS BECAUSE THEY REQUIRE THEIR LEADERS AND VOTING MEMBERS TO SHARE THEIR RELIGIOUS VIEWPOINTS IS A RECURRING AND PERVASIVE NATIONWIDE PROBLEM.

The Ninth Circuit has given public university officials the green light to derecognize religious student groups simply because they require their officers and voting members to agree with their core religious convictions. Within the Ninth Circuit alone, the extension of *Truth* to the college and university context affects over three million students enrolled at approximately 317 public institutions of higher learning, or approximately 23% of the nation's college, university, and graduate students.[3] This case will reverberate nationally because it has been closely watched. *See, e.g.*, Joan W. Howarth, *Teaching Freedom: Exclusionary Rights of Student*

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[3] These figures are calculated from the 2000 United States census. U.S. Census Bureau, Census 2000 Summary File 3 (SF 3) - Sample Data, QT-P19. School Enrollment: 2000, at http://factfinder.census.gov (click "get data" under "Decennial Census," then click "Census 2000 Summary File 3 (SF 3) - Sample Data," then click "Enter a Table Number," then enter "QT-P19" and press Enter, then select State, and select Alaska, Arizona, California, Hawaii, Idaho, Montana, Nevada, Oregon, and Washington and click Show Result; see figures for college, undergraduate, graduate, and professional school students at public schools).

Groups, 42 U.C. Davis L. Rev. 889, 892 n.4 (2009) (collecting selected articles on topic); Ryan C. Visser, Note, *Collision Course?:* Christian Legal Society v. Kane *Could Create a Split over the Right of Religious Student Groups to Associate in the Face of Law School Antidiscrimination Policies,* 30 Hamline L. Rev. 449 (2007); Note, *Leaving Religious Students Speechless: Public University Antidiscrimination Policies and Religious Student Organizations,* 118 Harv. L. Rev. 2882 (2005); Patricia A. MacLean, *Law School Need Not Support Religious Club that Discriminates*, National Law Journal, Mar. 23, 2009, *available at* http://www.law.com/jsp/nlj/PubArticleNLJ.jsp?id=1202429159976 (last visited Apr. 9, 2009); Burton Bollag, *Choosing Their Flock*, Chronicle of Higher Education, Jan. 28, 2005, *available at* http://chronicle.com/free/v51/i21/21a03301.htm (last visited Apr. 30, 2009).

CLS student chapters across the nation have had to resort to litigation after being threatened with loss of access to campuses because of alleged discrimination based on religion or sexual orientation. As discussed in the certiorari petitions in *Christian Legal Society v. Newton* and in this case, officials at Southern Illinois University revoked a CLS chapter's recognition on the ground that its Statement of Faith requirement constituted discrimination. The Seventh Circuit held that SIU officials violated the chapter's constitutional rights. *Christian Legal Soc'y v. Walker*, 453 F.3d 853 (7th Cir. 2006).

At Washburn University School of Law, a student who explicitly rejected CLS's statement of faith filed

a religious discrimination complaint against the CLS chapter because it refused to allow him to lead its Bible studies after he led a study contrary to CLS's religious viewpoints. The university restored recognition only after CLS filed suit. *Christian Legal Soc'y Chapter of Washburn Univ. Sch. of Law v. Farley*, No. 04-4120 (D. Kan. Sept. 16, 2004).

The University of Minnesota Law School threatened to deny recognition to the CLS chapter because it required its voting members and officers to subscribe to a statement of faith. Michael S. Paulsen, *A Funny Thing Happened on the Way to the Limited Public Forum: Unconstitutional Conditions on "Equal Access" for Religious Speakers and Groups*, 29 U.C. Davis L. Rev. 653, 675 (1996). Although it relented in response to a letter from a faculty member, the university subsequently denied another religious group recognition because it refused to state in its constitution that its membership was open to all students regardless of religion or sexual orientation. *Maranatha Christian Fellowship v. Regents of the Bd. of the Univ. of Minn. Sys.*, No. 03-5618 (D. Minn. Oct. 24, 2003). The university then changed its policy to allow religious student groups to "require their voting membership and officers to adhere to the organization's statement of faith and its rules of conduct." Student Unions & Activities, *Registration and Classification of Student Groups, in Student Unions & Activities Policy Handbook, available at* http://www.sao.umn.edu/groups/handbook/classification.php (last modified Apr. 15, 2008).

Even a law school that had a nondiscrimination policy that specifically exempted religious groups insisted that a CLS chapter pledge not to discriminate on the basis of religion. After suit was filed, the University of Toledo Law School reaffirmed its religious exemption and agreed that religious groups could cite to the Bible in their constitutions. *Christian Legal Soc'y Chapter of the Univ. of Toledo v. Johnson*, No. 05-7126 (N.D. Ohio Jun. 16, 2005).

In November 2008, relying on the district court decision in *Christian Legal Society v. Newton* and the *Truth* decision, a magistrate judge recommended that the district court deny a constitutional challenge to the University of Montana School of Law's derecognition of a CLS chapter because of its religious requirements for membership and leadership. *Christian Legal Soc'y v. Eck*, No. 07-154 (D. Mont. Nov. 14, 2008). The district court has not issued a final decision.

In the early 1990's, state universities began to enforce policies prohibiting discrimination on the basis of sexual orientation against student groups whose religious principles teach that "homosexual behavior [is] a sin that disqualifies those who practice it from membership or leadership within the group." Stephen M. Bainbridge, *Student Religious Organizations and University Policies Against Discrimination on the Basis of Sexual Orientation: Implications of the Religious Freedom Restoration Act*, 21 J.C. & U.L. 369 (1994). Professor Bainbridge described the University of Illinois's derecognition of CLS when its student leaders "refused to sign a

University pledge to refrain from discrimination on the basis of sexual orientation." *Id.* at 370.

In a similar dispute, Arizona State University College of Law eventually conceded that CLS's practice did not constitute discrimination on the basis of sexual orientation and granted recognition to religious groups that limited voting membership and leadership to students sharing the same religious beliefs. *Christian Legal Soc'y Chapter at Ariz. State Univ. v. Crow,* No. 04-2572 (D. Ariz. Nov. 17, 2004).

Unfortunately, other student groups sometimes actively pressure a law school to deny CLS the same recognition they enjoy. For example, in 2003, a member of the Outlaw chapter at Ohio State University's Moritz College of Law filed a formal complaint demanding that the law school derecognize the CLS chapter because its officers and members signed a statement of faith agreeing, among other things, to comply with scriptural standards of sexual morality. *See* Jeff Polesovsky, *GLBT Group Files Formal Complaint Against CLS,* The Lantern, Nov. 18, 2003, *available at* http://www.thelantern.com/main.cfm?include=detail&storyid=560959 (last visited Apr. 9, 2009). When university officials threatened to withdraw recognition, CLS filed suit. *Christian Legal Soc'y Chapter of the Ohio State Univ. v. Holbrook,* No. 04-197 (S.D. Ohio 2004). In response, the university amended its policy to allow religious student groups to "adopt a nondiscrimination statement that is consistent" with their sincerely held religious beliefs. Ohio Union, Student Organization Registration

Guidelines, at 7, *available at* http://ohiounion.osu.edu/studentorgs/orgs_manage.asp#newreq (last visited Apr. 9, 2009).

Recently, the Iowa Campaign for Human Rights student group at the University of Iowa School of Law circulated a petition urging the university to deny funds to the CLS chapter. Adam Sullivan, *UI Christian Legal Society's Funding Under Fire*, Daily Iowan, Mar. 3, 2009, *available at* http://www.dailyiowan.com/2009/03/03/Metro/10365.html (last visited Apr. 30, 2009). On other occasions over the past six years, the university or the student government has threatened to penalize CLS.

CLS also has faced recognition issues at the law schools of Florida State University, the University of Oklahoma, the University of Pittsburgh, the University of New Mexico, the University of Idaho, and the University of South Carolina.

Several cases involving other student religious groups have reached federal court. In February 2009, relying on the Ninth Circuit's ruling in *Truth*, a district court held that California State University could deny recognition to four Christian organizations because they required members and officers to agree with the groups' religious viewpoints. *Every Nation Campus Ministries at San Diego State Univ. v. Achtenberg*, 597 F. Supp. 2d 1075 (S.D. Cal. 2009), *docketed on appeal sub nom. Alpha Delta Chi-Delta Chapter v. Reed*, No. 09-55299 (9th Cir. Feb. 27, 2009).

In a case currently pending in the Eleventh Circuit, the University of Florida denied recognition to Beta Upsilon Chi ("BYX"), a religious student organization, because it required voting members and officers to affirm its orthodox Christian viewpoint. Denying a preliminary injunction, the district court held that the university's denial of recognition did not violate BYX's rights of expressive association and free speech. *Beta Upsilon Chi, Upsilon Chapter at the Univ. of Fla. v. Machen,* 559 F. Supp. 2d 1274 (N.D. Fla. 2008). The Eleventh Circuit granted an injunction pending appeal and heard oral argument on December 10, 2008. *Machen,* No. 08-13332 (11th Cir. Jul. 30, 2008). (After argument, the university claimed to change its policy and filed a motion to dismiss the appeal as moot, which is pending.)

In 2007, a district court granted a preliminary injunction against the University of Wisconsin to prevent it from requiring a Catholic organization to include non-Catholics as members. *Univ. of Wis.-Madison Roman Catholic Found. v. Walsh,* No. 06-649, 2007 WL 1056772, at *4 (W.D. Wis. Apr. 4, 2007).

A district court granted a preliminary injunction against the University of North Carolina when it denied recognition to a Christian student organization because the group required its officers and members to agree with its religious viewpoints. *Alpha Iota Omega Christian Fraternity v. Moeser,* No. 04-765, 2005 WL 1720903, at *1 (M.D.N.C. Mar. 2, 2005). After the university adopted a new policy allowing all groups to "limit membership and

participation in the organization to students who, upon individual inquiry, affirm that they support the organization's goals and agree with its beliefs," the case was dismissed as moot. *Alpha Iota Omega Christian Fraternity*, 2006 WL 1286186, at *3 (M.D.N.C. May 4, 2006).

Along the same lines, the Muslim Student Association at Louisiana State University was derecognized in 2003 after thirty years on that campus. LSU required all groups to place a nondiscrimination policy regarding religion and sexual orientation in the groups' constitutions, which the Muslim group refused to do because of its religious beliefs. Press Release, Foundation for Individual Rights in Education, Victory for Religious Freedom at Louisiana State University (Mar. 17, 2005), *available at* http://www.thefire.org/index.php/article/5436.html (last visited Apr. 30, 2009).

In addition to its lawsuit in the Eleventh Circuit against University of Florida, BYX was forced to litigate after the University of Georgia denied recognition on the ground that the Christian group required its officers and members to agree with its core religious viewpoints. *Beta Upsilon Chi v. Adams,* No. 06-104 (M.D. Ga. 2006). BYX has experienced recognition threats at Louisiana State University, Auburn University, and the University of Missouri.

ReJOYce in Jesus Campus Fellowship was threatened with denial of recognition by the Georgia Institute of Technology because the group required its voting members to affirm its statement of faith.

The Georgia Attorney General issued an opinion that the university's failure to recognize the religious student group violated its free speech rights. Ga. Op. Att'y Gen. 97-32 (1997). The group experienced a similar problem at the University of California, Berkeley.

DiscipleMakers Christian Fellowship was forced to file suit against Pennsylvania State University after university officials insisted that the group discriminated on the basis of religion in officer positions. In settlement, the university agreed to exempt religious groups from the nondiscrimination requirement. *DiscipleMakers v. Spanier,* No. 04-2229 (M.D. Pa. 2005).

The Christian Medical and Dental Association ("CMDA") chapter at the University of North Dakota was threatened with derecognition by the student government because CMDA requires its officers to share its religious viewpoints. CMDA also encountered problems at the College of Medicine and Dentistry of New Jersey and at Virginia Tech.

The conflict between the Ninth Circuit (*Truth* and *Newton*) and the Seventh Circuit (*Walker*) means that national religious organizations, including *amici* Christian Legal Society, Campus Crusade for Christ, and InterVarsity Christian Fellowship, cannot maintain uniform national membership criteria across their different campus chapters.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

GREGORY S. BAYLOR
COUNSEL OF RECORD
KIMBERLEE WOOD COLBY
M. CASEY MATTOX
CENTER FOR LAW &
RELIGIOUS FREEDOM
CHRISTIAN LEGAL SOCIETY
8001 Braddock Road
Suite 300
Springfield, Va. 22151
(703) 642-1070 ext. 3502
Counsel for Amici Curiae

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